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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 323

EDWARD H. COOLIDGE, JR.,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT

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INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. Petitioner's 1951 Pontiac automobile as instrumentality of crime.	17
II. The search warrants were lawfully issued and were valid.	20
III. The seizure of petitioner's automobile was incident to a lawful arrest.	26
IV. The seizure of petitioner's automobile was valid on basis of probable cause alone.	28
V. Vacuum sweepings of petitioner's automobile legally were not searches and seizures.	29
VI. Lawful custody of petitioner's automobile justifies searches and seizures of particles in automobile without warrant	30
VII. There was no search and seizure of petitioner's personal possessions on February 2, 1964.	35
CONCLUSION	47

CITATIONS

Cases:

Aguilar v. Texas, 378 U.S. 108	13, 14, 20, 22, 23
Amos v. United States, 255 U.S. 313	15, 44
Anderson v. State, 192 Wis. 352, 212 N. W. 628	27
Beck v. Ohio, 379 U.S. 89	20
Brinegar v. United States, 338 U.S. 160	20

Page

Carroll v. United States, 267 U.S. 132 ..... 14, 28
Chambers v. Maroney, 399 U.S. 42 ..... 14, 28
Chapman v. United States, 365 U.S. 10 ..... 15, 44
Cooper v. California, 386 U.S. 58 ..... 15, 30, 31, 34
Draper v. United States, 358 U.S. 307 20
Frazier v. Cupp, 394 U.S. 731 ..... 15, 44, 45
Giordonello v. United States, 357 U.S. 480 20
Golding's Petition, 57 N.H. 146 21
Hale v. Henkel, 201 U.S. 43 ..... 15, 39
Harris v. Stephens, 361 F. 2d 888, cert. denied, 386 U.S. 964 20
Harris v. United States, 390 U.S. 234 ..... 14, 15, 28, 29
Henry v. Mississippi, 379 U.S. 443 ..... 15, 44
Henry v. United States, 361 U.S. 98 20
Johnson v. State, 238 Md. 528 209 A. 2d 765 ..... 20, 23
Johnson v. United States, 333 U.S. 10 20
Ker v. California, 374 U.S. 23 ..... 15, 29
Lefkowitz v. United States, 285 U.S. 452 ..... 14, 27
Lopez v. United States, 370 F. 2d 8 24
Mancusi v. DeForte, 392 U.S. 364 ..... 20, 25, 26
Maxwell v. Stevens, 348 F. 2d 325 44
McGrath v. Manufacturer's Trust Co., 338 U.S. 241 27
Miller v. Sigler, 353 F. 2d 424 24
People v. Hall, 8 Cal. Rptr. 760, 186 C. A. 2d. 388 27
People v. Webb, 66 Cal. 2d 107, 424 P. 2d 342 35
Preston v. United States, 376 U.S. 364 ..... 30, 31, 32
Roberts v. United States, 332 F. 2d 892 44
State v. McCoy, 249 Or. 160, 437 P. 2d 734 ..... 20, 34

	Page
State v. Morris, S. C. 133 S E 2d, 744, 748	39
State v. Titus, 106 N.H. 219	23
Stein v. United States, 166 F. 2d 851	44
Stoner v. California, 376 U.S. 483	15, 44
United States v. Alloway, 397 F. 2d 110	45
United States v. Atkinson, 297 U.S. 157	27
U.S. v. Cook, D. C. Tenn. 213 F. Supp. 568, 571	39
United States v. Doyle, 373 F. 2d 875	20, 32
U.S. ex rel Stacey v. Pate, 324 F. 2d 934, 935	39
United States v. Rabinowitz, 339 U.S. 56	14, 27
United States v. Retolaza, 398 F. 2d 235	45
United States v. Sconfienza, 309 F. Supp. 322	20, 31
United States v. Sergio, 21 F. Supp. 553	44
United States v. Sferas, 210 F. 2d 69	44
United States v. Stone, 401 F. 2d 32	44
Walters v. City of St. Louis, Mo., 347 U.S. 231	27
Weeks v. United States, 232 U.S. 383	15, 29, 39

Miscellaneous:

N.H. Constitution, Part I, Article 19	21
N.H. Constitution, Part 2, Articles 75 and 84	21
79 Corpus Juris Secundum 775, 776	39

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BRIEF FOR RESPONDENT

STATEMENT

Two indictments were returned by the Grand Jury in the January, 1964, Term of Superior Court of Hillsborough County charging the petitioner, Edward H. Coolidge, Jr., with the murder of Pamela Mason. (App. 3-4).

On July 23, 1964, the petitioner filed a Petition to Quash Search Warrants, seeking to suppress items of personal property belonging to him which were obtained by the police during their investigation of this case both with and without search warrants.

A hearing was held on this petition on August 31, 1964, and September 1, 1964, during which oral testimony was presented by the petitioner in furtherance of his petition. Nine witnesses testified at the hearing, seven of whom were police officers (App. 7-132).

The Hillsborough County Superior Court made Tentative Findings on the petition on September 1, 1964, at the conclusion of the hearing. (App. 184-189).

Subsequent to this, the petitioner filed a Request for Findings of Fact and Requests for Rulings of Law, and the respondent, State of New Hampshire, also filed a Request for Findings of Fact. (App. 189-194).

On September 18, 1964, the State filed a Motion for Further Hearing upon the Petitioner's Petition to Quash, which the Superior Court granted on October 6, 1964. A further hearing was held on October 13, 1964, and at the conclusion of the hearing, the Superior Court made further findings of fact as requested by the State. (App. 194-195).

On the same date, October 13, 1964, the Superior Court made rulings on petitioner's and the State's Requests for Findings and Rulings. (App. 196-198).

The Superior Court, then made a Composite of Findings on Petitioner's Petition to Quash, and the petitioner and respondent both filed exceptions to the Superior Court's Findings. (App. 199-205).

The Superior Court did not rule on the motion or make rulings of law, but instead reserved and transferred all questions of law raised in the proceedings outlined above, for a decision by the New Hampshire Supreme Court. A Reserved Case was transferred to the New Hampshire Supreme Court. (App 205-206).

This appeal was argued before the New Hampshire Supreme Court on January 8, 1965. Its decision was handed down on March 11, 1965, and petitioner's Motion for Rehearing was denied on April 13, 1965. (App. 207-226).

The petitioner then filed a Motion to Return and Suppress Evidence in the Superior Court on May 13, 1965, which was denied on May 14, 1965. (App. 227).

The petitioner's trial commenced on May 17, 1965, in the Superior Court of Hillsborough County, New Hampshire, and on June 22, 1965, the petitioner was convicted of murder. (App. 259-260).

Petitioner appealed his conviction and a Reserved Case was transferred to the New Hampshire Supreme Court. (App. 261).

The petitioner's exceptions were overruled on appeal by the New Hampshire Supreme Court. (App. 262-286).

A brief summary of the salient facts in this case will place the issues raised by petitioner in proper perspective.

The victim, Pamela Mason, was a 14-year-old girl. She left her home in Manchester, New Hampshire, about 6 p.m. on January 13, 1964, during a major storm with blizzard conditions, apparently responding to a man's telephone call for a babysitter. On January 21, 1964, eight days after she disappeared, her body was found on the west side of Interstate Highway 93, a modern, high-speed highway with an open median strip running south to eastern Massachusetts cities. The victim died from two to four hours after her last meal on January 13, 1964, from gunshot and knife wounds. (App. 262-266).

The following is a summary of the petitioner's activities on January 13, 1964, the day the victim was murdered, based upon the testimony presented at the trial:

2:00 - 2:30 p. m.	Drove his bread truck into his yard at 312 Seames Drive, stayed home a short time and drove off. (Transcript of Trial, Vol. 5, p. 135)
4:05 p. m.	Checked out of work at Cote Brother's Bakery. (Transcript of Trial, Vol. 6, p. 91)
3:30 - 4:30 p. m.	Ferris Ebol saw petitioner in the Syrian American Club. (Transcript of Trial, Vol. 5, p. 169)
4:30 - 5:00 p. m.	Purchased gas and dry gas at Somerville Street Garage. (Transcript of Trial, Vol. 5, pp. 165-167, 181, 201-205)

5:00 - 5:30 p. m. Home for five minutes at 312 Seames Drive. (Transcript of Trial, Vol. 5, pp. 135-136)

5:00 - 5:30 p. m. Habib Nassoura saw petitioner briefly at Syrian American Club and petitioner declined to play a game of gin rummey. Petitioner left the club. (Transcript of Trial, Vol. 5, pp. 177-178)

9:30 p. m. Mr. Gravel and Mr. Bushey stop near petitioner's car, the 1951 Pontiac which is parked in the northbound lane of Interstate 93 approximately opposite the place where Pamela Mason's body was found. (Transcript of Trial, Vol. 5, pp. 206-222, 224-242)

11:15 p. m. Arrived at his home, with his uniform pant legs wet up to the calf below the knee. (Transcript of Trial, Vol. 5, pp. 139-141)

The petitioner was employed by Cote Brothers Bakery as a route man. The evidence indicated he was absent from his home at 312 Seames Drive in Manchester between 5:30 and 11:15 p.m. He admitted that he had attempted following January 13, 1964, to establish an alibi for his whereabouts that night. (App. 263-264).

The following is a summary of the alibi evidence:

Tuesday, January 14, 1964 — John P. Arahovites was approached by the petitioner for an alibi for January 13, 1964. He agreed. (Transcript of Trial, Vol. 6, pp. 4-5)

Week of January 13, 1964 — Anthony F. Norcia was approached by the petitioner for an alibi for January 13, 1964. He refused to talk to the petitioner about it. (Transcript of Trial, Vol. 6, pp. 31-34)

Tuesday, January 21, 1964 — John P. Arahovites was again approached by the petitioner who stated: "Now I really need this alibi." This was at 2:00 p.m. that afternoon. The discovery of Pamela Mason's body was not reported to the police until after 3:00 p.m. that afternoon. Arahovites refused to go along this time. (Transcript of Trial, Vol. 6, pp. 6-10)

Wednesday, January 22, 1964
or Thursday, January 23, 1964 — Richard D. Loosian, owner of Syke's Variety was approached by the petitioner for an alibi for January 13, 1964. He agreed. (Transcript of Trial, Vol. 6, pp. 46-51)

Thursday, January 23, 1964 — Bernard Spero was approached by the petitioner for an alibi for January 13 1964. Spero did not give him a definite answer. This contact was made at the Primrose Market in Haverhill. The petitioner was not delivering bread there that day. (Transcript of Trial, Vol. 6, pp. 17-20)

Friday, January 24, 1964 — Bernard Spero was again approached by the petitioner for an alibi. They met at the Primrose Market and Spero told the petitioner he would have to think it over. The petitioner tried to see Spero that afternoon at Fantini's Bakery, but Spero would not see the petitioner and hid out on him in the cellar of the bakery. (Transcript of Trial, Vol. 6, pp. 21-26)

Friday, January 24, 1964 — Lawrence J. Pentaliros was approached by the petitioner in Plaistow, New Hampshire, for an alibi for January 13, 1964. He refused. (Transcript of Trial, Vol. 6, pp. 39-42)

Tuesday, January 26, 1964 — Mrs. Coolidge, the petitioner's wife, approached her next door neighbor, Mrs. Dorothy Maheu, and asked her to alibi for her husband between the hours of 5:00 and 7:00 p.m. on January 13, 1964. She refused. (Transcript of Trial, Vol. 12, pp. 283-284).

The respondent, State of New Hampshire, produced evidence that the fatal bullets were fired from petitioner's gun. It was established that petitioner owned more than one knife which could have inflicted the knife wounds, and that one of his knives was lost on the day that the victim disappeared and was found on the following morning, January 14, 1964, near a laundromat which the petitioner testified he had visited before going home at 11:15 p.m. the night of January 13, 1964. (App. 264).

During the trial the petitioner again objected to the admissibility of the evidence obtained pursuant to the search warrants, on constitutional grounds.

The New Hampshire Supreme Court ruled in *State v. Coolidge*, 106 N.H. 186 (App. 207-225) that, on its face, each of the challenged search warrants complied with the New Hampshire statutory requirements. It was further ruled that there was no evidence requiring a finding that the Attorney General could not perform, as a Justice of the Peace, the functions required of a "justice" under the applicable New Hampshire statute, or that he could not judge for himself the persuasiveness of the facts relied on to show probable cause or that he did not find probable cause from facts or circumstances presented to him under oath or affirmation by the chief of police.

The New Hampshire Supreme Court ruled that on a preliminary motion to suppress, the petitioner, as the moving party, had the burden of proving that the evidence was illegally obtained, and that the State was not required to disclose its entire case to prove that probable cause to issue the warrants existed.

Finally, the New Hampshire Supreme Court ruled, as follows:

> "If at the trial the State offers evidence secured under these warrants and it is challenged, then, as stated in its brief, the State will have the burden of presenting evidence to the Trial Justice of facts in existence when the warrants were issued which established to the magistrate the probable cause upon which their issuance was based."

Evidence obtained under these warrants was offered by the respondent and challenged by petitioner during the trial. As a result, a hearing was held upon this issue without the jury being present. At this hearing the respondent, as stated in the New Hampshire Supreme Court opinion quoted above, had the burden of presenting evidence to the Trial Justice of facts in existence which established to the magistrate the probable cause upon which their issuance was based.

The respondent offered the testimony of one witness, Chief of Police, Francis P. McGranaghan, at this hearing. (Transcript of Trial, Vol. 6, pp. 182-227; App. 230-250).

Chief McGranaghan testified that in the afternoon of February 19, 1964, Assistant Chief Norman Leavitt returned to the Manchester Police Station from the University of Rhode Island Criminal Investigation Laboratory with a report that the ballistics experts there had informed him that the bullet which

killed Pamela Mason was fired from the Mossberg .22 rifle owned by the petitioner.

Chief McGranaghan then requested a meeting with the Attorney General that afternoon and went to Concord to confer with him. He took his subordinates with him, including Assistant Chief Leavitt, Captain John Stips and Lieutenant John Curran, as well as Captain Marchand of the State Police. The purpose of taking his subordinates was to go over with the Attorney General the evidence that had been gathered through the investigation in order to acquaint him with all the facts.

The meeting that afternoon took place in the Attorney General's Office and lasted for over two hours. Also present in addition to the Attorney General, William Maynard and the Police Chief's subordinate officers, were Assistant Attorneys General William O'Neil and Alexander Kalinski, and Colonel Joseph Regan and Captain John Conti of the New Hampshire State Police.

Chief McGranaghan brought the following facts and reports to the attention of the Attorney General that afternoon:

1. The ballistics information from the University of Rhode Island Criminal Investigation Laboratory that the petitioner's Mossberg .22 rifle fired the bullet which was found in the victim's brain.

2. The petitioner could not satisfactorily explain his absence from his home on the night of January 13th, between the hours of 5:00 p.m. and 11:00 p.m.

3. The petitioner's neighbor, Mrs. Maheu, saw him arrive at his home at 11:00 p.m. and go immediately into the bathroom.

4. The petitioner's vehicle, the 1951 Pontiac, was observed on the highway in the vicinity of where the body of Pamela Mason was found, at about 9:30 p.m. on the night she disappeared, January 13, 1964.

5. The facts concerning the many alibis that petitioner had given for his whereabouts on January 13, 1964 and that they were proven to be false.

6. The petitioner, by his own admission, had control of and owned the 1951 Pontiac on the night of January 13, 1964

and had admitted being on the highway that night near where the victim's body was found.

After relating these facts, Chief McGranaghan requested that the Attorney General issue an arrest warrant for the arrest of the petitioner and four search warrants to search petitioner's two automobiles, his home and his aunt's laundromat. The Chief stated he would be the complainant on these warrants.

Thereafter the Attorney General's Office prepared the complaints, and the Attorney General, acting as a Justice of the Peace, took Chief McGranaghan's oath to the search warrants.

At the conclusion of the hearing, the Trial Court ruled specifically that the evidence from the petitioner's Pontiac car, if offered by the State, would be admissible in evidence, thereby upholding the validity of the search warrant issued to search the Pontiac car. This was the only search warrant issue before the Trial Court during the trial.

The entire text of the Trial Court's ruling is set forth in the Appendix at pp. 250-252.

The second search and seizure issue raised by petitioner concerns the events which took place on Tuesday, January 28, 1964, and on Sunday, February 2, 1964.

On Tuesday, January 28, 1964, Officer Maurice Leclerc and Det. Sgt. Paul Doyon went to the home of the petitioner, Edward H. Coolidge, Jr., in the course of a routine investigation. Officer Leclerc testified that at this interview Coolidge was asked concerning his background and also concerning his activities on January 13, 1964. (App. 111).

During the course of the interview, Officer Leclerc and Det. Sgt. Doyon asked Coolidge about what firearms he owned, and Coolidge told them he owned certain firearms and brought out three firearms to show to them. Officer Leclerc testified that he listed these and they were:

1 Marlin 30-30 rifle
1 Mossberg Shotgun 410 Gauge
1 Remington Shotgun 16 Gauge (App. 111-112)

Mrs. Coolidge, when she testified, stated that she was present when her husband brought out the firearms, and that she saw her husband showing these firearms to the police on January 28, 1964. (App. 100).

Also at this interview Officer Leclerc and Det. Sgt. Doyon asked Coolidge if he would agree to take a lie detector test and he stated that he would be willing to do so. Coolidge further stated that he would prefer to take the test on a Sunday since that was one of his days off. (App. 112).

On this visit, Officer Leclerc and Det. Sgt. Doyon took no items of personal property from the petitioner, Coolidge, and Officer Leclerc testified that Coolidge was very cooperative during this interview, answered all questions, and voluntarily showed them his firearms. (App. 112). On this visit also, Officer Leclerc and Det. Sgt. Doyon made a brief search of Coolidge's two automobiles, with his permission and assistance. Officer Leclerc testified that after asking him for and obtaining Coolidge's permission the three of them went outside, and Coolidge assisted the officers in examining both of his automobiles, one of which was the 1951 Pontiac which was subsequently seized by the police at the time of his arrest. (Transcript of Trial, Vol. 4, p. 175).

On February 2, 1964, the following Sunday, Officer Leclerc called Coolidge at 8 o'clock in the morning with reference to Coolidge taking a lie detector test. As a result of this telephone conversation, an appointment was made for Coolidge to come to the Manchester Police Station at 1 o'clock that afternoon for the purpose of taking a lie detector test. (App. 112).

Coolidge arrived at the Manchester Police Station, according to the testimony of the officers, at approximately a quarter of one on February 2, 1964. After Coolidge arrived at the Manchester Police Station that afternoon, he stayed at the police station until a quarter of four, and during this time, Coolidge, Inspector Glennon and Officer Leclerc had discussions concerning the lie detector test and concerning his particular involvement in the case insofar as his being a suspect. (App. 24-28, 112-113).

Two police officers were sent to Mrs. Coolidge's home and Mrs. Coolidge came down to the Manchester Police Station and talked to her husband for approximately five minutes. After their brief conversation, Coolidge left for the State Police barracks in Concord with Officer Maurice Leclerc and Inspector Donald Glennon. (App. 27, 91-92, 113).

When they arrived in Concord, Coolidge left with Det. Sgt. William McBain for the purpose of taking a lie detector test.

Just prior to taking the test, Coolidge, in conversation with Det. Sgt. McBain, admitted to Det. Sgt. McBain that he had committed a larceny of approximately $300 from his employer, Cote Brothers, Inc., in Manchester, at some previous date. (App. 28, 48).

After the lie detector test was finished, Det. Sgt. McBain called Officer Leclerc aside and told him about the fact that Coolidge had admitted committing a larceny. On the way back to Manchester in the police cruiser there was some discussion, according to the testimony, between Coolidge and Inspector Glennon about the larceny, but no further admissions by Coolidge concerning the larceny. (App. 29, 48, 113-114).

According to the testimony of Officer Leclerc and Inspector Glennon, they, along with Coolidge, arrived at the Manchester Police Station at around 7 o'clock in the evening on that Sunday, February 2, 1964. Officer Leclerc testified that he ordered some food for Coolidge and that Coolidge was fed a hot meal at that time. Officer Leclerc further testified that before leaving Concord he asked Coolidge if he wanted to stop in Concord to eat, but the petitioner, Coolidge, replied that he preferred to wait until they got back to Manchester. (App. 28-29, 113-114).

Officer Leclerc and Inspector Glennon both testified that they did not talk to Coolidge again concerning the larceny until 2 o'clock in the morning of the following day, Monday, February 3, 1964. They both testified further that the rest of the evening, from after the time they returned from Concord until 2 o'clock the next morning, they talked to Coolidge only about the Mason case. Coolidge was charged with the larceny at 2:30 in the morning on Monday, February 3, 1964 (App. 30-31, 114).

Inspector Donald Glennon testified that just before Coolidge was brought downstairs at the police station early Monday morning, February 3, 1964, to be booked for the larceny, he saw his guns and clothes and said something like "I see you have my guns and clothes." Inspector Glennon also testified that the following morning in the Clerk of Court's Office in Manchester Municipal Court, Coolidge offered to sell him one of the guns, a thirty-thirty. (App. 204).

At the Manchester Police Station that night Inspector Glennon testified that Coolidge was very cooperative and that Coolidge was free to come and go. It is also clear in his testimony

that during the course of that Sunday evening Coolidge at no time requested to leave. (App. 44, 46, 61).

At 10:30 o'clock that evening, Sunday, February 2, 1964, Inspector Donald Glennon and Det. Sgt. William McBain went to the home of Coolidge at 312 Seames Drive in Manchester for the purpose of talking to his wife, Mrs. Joanne Coolidge. They both testified that their main purpose in going to talk to Mrs. Coolidge was to discuss the Mason case with her and incidentally to check out one aspect of the larceny situation. (App. 33, 50).

The Superior Court found as a fact that at this time the police and investigating authorities had no knowledge of the exact calibre or type of weapon that they were looking for, it generally being the theory of the police at that time that the weapon might be a small hand gun or revolver. There was testimony that Inspector Glennon and Det. Sgt. McBain did not know at this time that Coolidge had any firearms. (App. 124-127, 200-201).

Inspector Glennon and Det. Sgt. McBain testified that insofar as they were aware at that time, they were not looking for rifles or shotguns and, in fact, were not looking for any specific weapons. They testified that they thought that they were looking for a small hand gun and at that time they were checking all firearms generally in the possession of people in the vicinity of Manchester. (App. 42, 56, 124-127).

According to their testimony, when they arrived at the Coolidge home that Sunday evening, Coolidge's mother, Mrs. Dorothy Coolidge, was there with his wife, Mrs. Joanne Coolidge. Shortly after they arrived, Mrs. Dorothy Coolidge, Coolidge's mother, left. Mrs. Dorothy Coolidge testified that she was told to leave and the testimony of Inspector Glennon and Det. Sgt. McBain on this point was that they did not directly ask Mrs. Coolidge to leave, but that they did suggest indirectly that they would prefer to talk to Mrs. Joanne Coolidge alone, and after the suggestion, Mrs. Dorothy Coolidge called her daughter and left. (App. 33-34, 38, 55-56, 58-59, 109-110.)

After Mrs. Dorothy Coolidge left, they talked to Mrs. Joanne Coolidge for approximately one-half to three-quarters of an hour. They testified that they were at the Coolidge home from about 10:30 o'clock that evening to about 11:15 p.m. They further testified that during most of this period they talked about the Mason case. (App. 33-36, 56).

Inspector Glennon and Det. Sgt. McBain testified that in the course of talking to Mrs. Joanne Coolidge that evening, they told her that they were checking firearms generally in the course of their investigation. They testified that when they mentioned this to Mrs. Joanne Coolidge, she told them that her husband had certain firearms and offered to show these firearms to them. They further testified that Mrs. Joanne Coolidge voluntarily turned these firearms over to them for examination, and according to them she stated: "We have nothing to hide." When Mrs. Coolidge testified, she admitted making this statement. (App. 42-43, 50, 102-103).

Mrs. Joanne Coolidge's testimony further corroborates the testimony of Inspector Glennon and Det. Sgt. McBain. On this point of the obtaining of Coolidge's firearms by Inspector Glennon and Det. Sgt. McBain on that evening, Mrs. Joanne Coolidge testified that she asked them if they wanted the guns and one said: "No", and the other said: "We had better take them." Mrs. Coolidge further testified concerning the firearms that she said that evening: "If you would like to take them it is all right." (App. 102).

The following excerpts from the testimony of Joanne Coolidge amplify this point:

Q. What else did they ask you about?

A. They asked if Ed had any rifles, and I said, 'Yes, he does.' *Then I asked if they would like to see them*, and they said, 'We will come with you.' (App. 93)

Q. And I suppose you know they were the same guns?

A. They asked if we had any firearms in the house. I guess they called them guns or rifles. I said, 'Yes'. I said, 'I will get them in the bedroom', and they said, 'We will come with you.' (App. 101)

Q. What did they actually say about taking the guns?

A. *I believe I asked if they wanted the guns.* One gentleman said, 'No': Then the other gentleman turned around and said, "We might as well take them". I said, *'If you would like them, you may take them.'* (App. 103).

According to the testimony developed at the hearing, the firearms were in the bedroom closet in the Coolidge home. Mrs.

Joanne Coolidge testified that she went into the bedroom, the police officers followed her, and she got the guns out of the closet and then handed them over to the police officers. (App. 94, 101).

Mrs. Coolidge also testified that during the course of this visit by Inspector Glennon and Det. Sgt. McBain, she gave them certain items of clothing, including a hunting jacket and a pair of her husband's work trousers. The officers gave her a receipt for these items and this receipt indicated what items they had taken. The trousers were in a hamper near the bedroom door leading from the hallway into the bedroom, and the hunting jacket was in a closet in the hallway, whereas the firearms were in the bedroom closet. (App. 94-95, 101, 102)

Petitioner's exceptions to the Trial Court's ruling admitting the evidence which he challenged on constitutional grounds, were saved and argued on appeal.

The New Hampshire Supreme Court confirmed its prior ruling and upheld the admissibility of the evidence which the petitioner had challenged. (App. 269-270).

SUMMARY OF ARGUMENT

I

The petitioner's brief takes the position that the Attorney General who issued the search warrants in this case in his capacity as a Justice of the Peace could not act as "a neutral and detached magistrate" simply because he was also the chief prosecutor in the case. Among the cases relied on is the case of *Aguilar v. Texas*, 378 U.S. 108.

Under New Hampshire law, a Justice of the Peace is a judicial officer, who is required to take an oath of office swearing to bear true faith and allegiance to the state and to support the constitution thereof.

The Trial Court upheld the validity of the search warrants and found that a neutral and detached magistrate would have found probable cause upon the facts presented to the Attorney General. The New Hampshire Supreme Court upheld this ruling.

An objective view of the facts indicates that the Attorney General did in fact act as a "neutral and detached magistrate" and not merely as a rubber stamp for the police. This is all that *Aguilar v. Texas*, supra, and the other cited cases require. The fact that all the evidence presented to the magistrate was not sworn to under oath does not invalidate the proceeding, under the law stated in *Aguilar v. Texas*, supra.

II

The seizure of petitioner's 1951 Pontiac automobile at his home on February 19, 1964 was incident to a lawful arrest.

At no stage in these proceedings has the petitioner challenged the validity of the arrest warrant issued against him on February 19, 1964 and executed on that date. It must be presumed that the arrest warrant was validly issued.

If the arrest of the petitioner was lawful, then the seizure of the petitioner's 1951 Pontiac automobile as an instrumentality of the crime, incident to the arrest, was also lawful. *Lefkowitz v. United States*, 285 U.S. 452; *United States v. Rabinowitz*, 339 U.S. 56.

III

The seizure of the petitioner's automobile was valid on the basis of probable cause alone.

When the police arrested the petitioner at his home on the evening of February 19, 1964, his 1951 Pontiac automobile was parked in the driveway outside of his home in a mobile condition. The police had probable cause to believe that the petitioner had murdered the victim and that his automobile was an instrumentality of the crime.

Under such circumstances, the probable cause alone was sufficient to justify the police seizure of petitioner's automobile. *Chambers v. Maroney*, 399 U.S. 42; *Carroll v. United States*, 267 U.S. 132; *Harris v. United States*, 390 U.S. 234.

IV

All that the police did by means of the vacuum sweepings, was to pick up, by means of the vacuum cleaner, items which

were in plain view in the automobile, namely the minute particles and other debris lying on the floor and on the upholstery in the automobile. *Weeks v. United States*, 232 U.S. 383; *Ker v. California*, 374 U.S. 23; *Harris v. United States*, 390 U.S. 234.

V

Lawful custody of the petitioner's automobile justifies searches and seizures of particles in the automobile within a warrant. *Cooper v. California*, 386 U.S. 58.

VI

There was no search and seizure of petitioner's personal possessions on February 2, 1964.

A fair reading of the evidence relating to the events which took place on February 2, 1964 clearly points to only one conclusion: the petitioner's guns and clothes were not obtained as the result of an unreasonable search and seizure. In fact, all the facts indicate that there was no search, legally or practically, and also that there was no seizure in the legal context of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383; *Hale v. Henkel*, 201 U.S. 43.

With respect to the wife's consent, insofar as that is an issue, this Court has never decided the question of the capacity of one spouse to authorize a consent search of the family dwelling that is valid against the other spouse. The issue was raised in two cases but not decided. *Amos v. United States*, 255 U.S. 313; *Henry v. Mississippi*, 379 U.S. 443.

It is generally held that the constitutional right to be free from unreasonable searches and seizures protects the possessory right and not legal title. This same rule should apply in the husband and wife situation. *Chapman v. United States*, 365 U.S. 10; *Stoner v. California*, 376 U.S. 483; *Frazier v. Cupp*, 394 U.S. 731.

ARGUMENT

The first argument in petitioner's brief contends that the admission into evidence of the petitioner's 1951 Pontiac auto-

mobile and of the articles obtained from this automobile (the vacuum sweepings), on and after February 19, 1964, violated his rights under the Fourth and Fourteenth Amendments because the search and seizure took place under search warrants that did not meet the constitutional requirements.

The fundamental issue raised by the petitioner's first argument is whether or not the petitioner's 1951 Pontiac automobile and the articles obtained from this automobile, the vacuum sweepings, were properly and lawfully admitted into evidence at petitioner's trial, consistent with his constitutional rights under the Fourth and Fourteenth Amendments.

The petitioner limits the consideration of this issue in his brief to the validity or invalidity of the search warrants issued in this case. The contention is made that the search and seizure took place under the authority of search warrants that did not meet constitutional requirements.

The invalidity of the search warrants in question, according to petitioner's argument, resulted from the fact that they were not issued by a neutral and detached magistrate, but instead were issued by the Attorney General in charge of the prosecution in his capacity as a Justice of the Peace, and also from the fact that the affidavit, on the basis of which the search warrants were issued, stated no facts from which an independent magistrate could make his own determination upon the question of probable cause.

It is the contention of the respondent that the petitioner's 1951 Pontiac automobile and the articles obtained from this automobile were lawfully obtained consistent with the petitioner's constitutional rights and were properly admitted into evidence.

There are three independent grounds upon which the seizure of petitioner's 1951 Pontiac automobile on February 19, 1964, and the subsequent searches of this automobile by police, can be upheld. They are:

1. The search warrants were lawfully issued and the automobile was properly seized as an instrumentality of the crime by police in the execution of the search warrants.
2. The petitioner was lawfully arrested on February 19, 1964 at his home and his 1951 Pontiac automobile was seized incident to a lawful arrest as an instrumentality of the crime.

3. The automobile was in plain view in front of the petitioner's house on the evening of February 19, 1964 when he was arrested, the automobile was mobile, and the police, having sufficient evidence in their possession to establish probable cause that petitioner's 1951 Pontiac was an instrumentality of the crime, had not only a right, but a duty to seize his automobile under such circumstances.

I

PETITIONER'S 1951 PONTIAC AUTOMOBILE AS INSTRUMENTALITY OF CRIME

On Sunday evening, February 2, 1964, Sgt. McBain and Inspector Glennon returned to the police station at around 11:30 p.m. from the petitioner's home, where they had learned from her that petitioner had not been home on the evening of January 13, 1964, the night the murder was committed. They then questioned the petitioner about his whereabouts on January 13, 1964 from 5:00 p.m. to 7:00 p.m. (Transcript of Trial, Vol. 5, pp. 66-67).

After telling the police officers that his automobile was stuck in the snow in the northbound land of Interstate Route 93 just north of the Derry exit, he stated that when he freed himself, a station wagon stopped and offered assistance. He did not know the two occupants of the station wagon. He remembered that the station wagon had some orchestra advertising on the side. He recognized the passenger who spoke to him as a laundry or linen truck driver around Manchester. He said he got free and called his home telling his wife that he got stuck and that he would be home shortly. (Transcript of Trial, Vol. 5, pp. 22-23, 68-69, 195-196).

Gerald T. Gravel, Jr., worked for the Notre Dame Laundry for ten years prior to January, 1964. His laundry route took him up Seames Drive every day of the week past the defendant's house. (Transcript of Trial, Vol. 5, pp. 206-208).

On January 13, 1964, he left the Sacred Heart Hospital where he had visited his wife at eight-thirty in the evening with his

friend, Mr. Joseph Bushey, and together they drove to Derry, New Hampshire, on Interstate Route No. 93. (Transcript of Trial, Vol. 5, pp. 209-210).

They arrived at Derry, New Hampshire, at 9:00 p.m. The weather conditions were very bad, it was snowing and the roads were not plowed too well. They stayed in Derry ten minutes and while there picked up some musical instruments, guitars. They were in Mr. Bushey's automobile, a 1960 white, four-door Ford automobile. Mr. Bushey's car had a car rack about a foot high on its roof, on which was marked "The Blue Chords." They proceeded to drive back to Manchester by way of Interstate Route No. 93 again. (Transcript of Trial, Vol. 5, pp. 211-214).

After they passed Route 28, they saw a car stalled by the side of the road. They stopped in front of the stalled car, backed up and asked the driver if he had any trouble with his car. The driver replied that he didn't. The car was parked in the break down lane. (Transcript of Trial, Vol. 5, p. 216).

Mr. Gravel testified that a man was the driver of the car and all he could see was his profile. The car that the man was in was a two door Pontiac with a sun visor covering the windshield. (Transcript of Trial, Vol. 5, p. 217).

Mr. Gravel sometime later was shown a 1951 Pontiac with a visor at the Manchester Police Station and he testified that it was the same car he saw on the highway that night. (Transcript of Trial, Vol. 5, pp. 222).

Mr. Gravel did not recognize the man in the car. The man opened his window about three-quarters of the way down, and kept looking straight ahead as he answered Mr. Gravel's questions. He did not turn his head to speak at all. (Transcript of Trial, Vol. 5, pp. 217-218).

The road had been plowed where the 1951 Pontiac was stopped and it was not stuck in the snow. Its windshield wipers were running and its motor running. It was parked about ten inches from the guardrail post at the edge of the road. (Transcript of Trial, Vol. 5, p. 220).

Mr. Gravel got home at 10:30 p. m. that night. (Transcript of Trial, Vol. 5, p. 219).

The testimony of Mr. Joseph A. Bushey corroborated the testimony of Mr. Gravel. Mr. Bushey fixed the time that they

stopped next to the 1951 Pontiac at about 9:30 p.m. that evening. (Transcript of Trial, Vol. 5, p. 224-242).

The defendant told police that he got stuck in the snow on Interstate 93 north of the Derry turnoff and a car stopped to help him. He said he recognized the fellow who asked him if he needed any help as a linen or laundry truck driver in Manchester. He identified the car which the fellow was in as having advertising on it of an orchestra. (App. p. 264-265).

The body of the victim, Pamela Mason, was discovered alongside the southbound lane of Interstate Route 93 on January 21, 1964, approximately opposite from where the petitioner was parked in the northbound lane of Interstate Route 93 on the night of the murder, January 13, 1964. (Transcript of Trial, Vol. 2, pp. 6-7).

Pamela Mason was picked up at her home on the evening of January 13, 1964, just shortly after 6 p.m., ostensibly to go on a baby-sitting job in response to a telephone call from a man. (Transcript of Trial, Vol. 1, pp. 135, 137, 138, 189-192).

The time of death of the victim was fixed by medical testimony at from two to four hours after her disappearance on January 13, 1964, making it between 8 o'clock and 10 o'clock that evening. (Transcript of Trial, Vol. 3, p. 177; Vol. 4, p. 20).

The bullets taken from the skull of the victim were identified by four firearms identification experts as having been fired by petitioner's .22 Mossberg rifle, State's Exhibit 53. (Transcript of Trial, Vol. 6, pp. 148-150; Vol. 7, pp. 66-68, pp. 105-107; Vol. 8, pp. 212, 213, 215-216).

To summarize the above evidence, the police knew at the time of petitioner's arrest:

1. The victim, Pamela Mason, was picked up at her home by someone ostensibly to go on a baby-sitting job, on the evening of January 13, 1964 at about 6 p.m.
2. The victim's body was discovered by the side of the road in a snowbank west of the southbound lane of Interstate 93 on January 21, 1964, eight days after she disappeared, six-tenths of a mile north of the Londonderry, New Hampshire line.
3. The victim's time of death was fixed by medical testimony at between 8 and 10 o'clock on the evening of January 13, 1964.

4. The petitioner's 1951 Pontiac automobile was seen parked by the side of the road in the northbound lane of Interstate 93 at approximately 9:30 p.m. on January 13, 1964 with the petitioner in it, within the time span when the victim was murdered, and at a point approximately opposite where the victim's body was found.

5. The bullets taken from the skull of the victim were identified by four firearms identification experts as having been fired by petitioner's .22 Mossberg rifle.

The above facts, all within the knowledge of the police on February 19, 1964, clearly established probable cause for the police to believe that the petitioner's 1951 Pontiac automobile was an *instrumentality of the crime. United States v. Sconfienza,* 309 F. Supp. 322; *United States v. Doyle,* 373 F. 2d 875; *Harris v. Stephens,* 361 F. 2d 888; *Johnson v. State,* 238 Md. 528, 209 A. 2d 765; *State v. McCoy,* 249 Or. 160, 437 P. 2d 734.

It is clear, from a recitation of the above facts, that

> "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Brinegar v. United States,* 338 U.S. 160; *Henry v. United States,* 361 U.S. 98; *Beck v. Ohio,* 379 U.S. 89; *Draper v. U.S.,* 358 U.S. 307.

II

THE SEARCH WARRANTS WERE LAWFULLY ISSUED AND WERE VALID

Relying on *Mancusi v. DeForte,* 392 U.S. 364, and the related cases of *Johnson v. United States,* 333 U.S. 10; *Giordonello v. United States,* 357 U.S. 480; and *Aguilar v. Texas,* 378 U.S. 108, the petitioner's brief takes the position that the Attorney General who issued the search warrants in his case in his capacity as a Justice of the Peace could not act as a "neutral and detached magistrate" simply because he was also the chief prosecutor in the case.

Petitioner's contention ignores the realities of the factual circumstances involved and relying on the form of what happened, denies the substance of the proceeding.

The fact that the Attorney General was acting as a Justice of the Peace when he issued the search warrants is not purely a formal circumstance which is constitutionally irrelevant within the factual framework of this case, as contended by petitioner's brief.

Under New Hampshire law, a Justice of the Peace is a judicial officer, who is required to take an oath of office swearing to bear true faith and allegiance to the state and to support the constitution thereof. *Golding's Petition,* 57 N.H. 146; *N.H. Constitution,* Part 2, Articles 75 and 84. The New Hampshire Constitution has a prohibition against unreasonable searches and seizures similar to the provisions of the Fourth Amendment. *N.H. Constitution,* Part 1, Article 19, (App. p. 212).

The real issue raised by petitioner's brief on this point is whether or not the petitioner's constitutional rights under the Fourth and Fourteenth Amendments were denied to him by the procedure followed and by the manner in which the search warrants were issued in this case.

Very relevant to the determination of this issue is the ruling of the Trial Court, affirmed by the New Hampshire Supreme Court, that any neutral and detached magistrate would have found probable cause under these factual circumstances. The Trial Court, in its ruling upholding the validity of the issuance of the search warrants, made the following specific finding:

> ". . . a neutral and detached magistrate, having this evidence presented to him, whether under oath or not, would have been persuaded that there was probable cause for the arrest of Edward Coolidge for the murder of Pamela Mason; and that there was probable cause for the issuance of the warrants as issued. . ." (App. 251).

The New Hampshire Supreme Court upheld this ruling by the Trial Court as follows:

> "The circumstances surrounding the issuance of the warrant were fully explored at the trial in the absence of the jury. The Court's findings and ruling that the evidence presented to the magistrate was based upon reliable information and warranted

his finding of probable cause, are sustained. The record shows that the magistrate was fully informed as to *'the facts relied upon by the complaining officer to show probable cause, . . ."* (App. 269).

The fact that the Trial Court, in addition to the ruling referred to above, also made a comment by way of colloquy about the Attorney General wearing two hats is not relevant to a determination of this issue.

In analyzing the cases relied upon in petitioner's brief on this point, it is evident that what this Court has previously ruled is simply that *before a search warrant may issue, a magistrate must find probable cause on the basis of adequate facts presented to him by the police officer seeking its issuance.* Otherwise, the magistrate would be acting *merely as a rubber stamp for the police,* and would therefore not be acting *as a detached and neutral magistrate.*

As the evidence indicates in this case confirmed by the Trial Court's ruling, the Attorney General was not acting merely as a rubber stamp for the police when he issued the search warrants on February 19, 1964. Chief McGranaghan presented all of the underlying facts and circumstances to the Attorney General before swearing to the complaint under oath on the basis of which the search and arrest warrants were issued.

It is submitted that when Chief McGranaghan swore to the complaint under oath before the Attorney General, he, in effect, incorporated by reference into the complaint all of these facts and circumstances which he had previously related to the Attorney General.

A foot note in *Aguilar v. Texas,* supra, supports the above position. The footnote states as follows:

> "The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."

Aguilar v. Texas, supra, is cited by the petitioner in his brief to support the position that the search warrants in this case were illegal solely because they were issued by a Justice of the Peace who was also the Attorney General who was in charge

of the investigation of the crime involved. *Aguilar v. Texas,* supra, does not support such a conclusion or suggestion.

As the above quotations clearly indicate, all that the *Aguilar v. Texas,* supra, does state is that the magistrate, to whom application is made for a search warrant, whether he is a Justice of the Peace who is an Attorney General, or any other Justice of the Peace, must act as a "neutral and detached magistrate" in that his finding of probable cause must be based upon his own judgment on the facts and evidence and underlying circumstances presented to him, and that he must be persuaded by these facts and underlying circumstances that probable cause exists for the issuance of the warrants. If the magistrate merely accepts the *statement* of the complainant that probable cause exists without inquiring into the facts and underlying circumstances, then he is not acting as a neutral and detached magistrate. That is all that *Aguilar v. Texas,* supra, stands for.

Aguilar v. Texas, supra, does not hold that merely because a man wear two hats, or wears two pair of shoes as the Trial Court stated, one as a Justice of the Peace and the other as an Attorney General, he will not do his constitutional duty as a Justice of the Peace when an application for a search warrant is presented to him because he also happens to be the Attorney General directly interested in the solution of the crime with which the application for a search warrant is concerned.

The mere fact that all of the facts and circumstances presented to the Attorney General by Chief McGranaghan were not also written down and specifically sworn to under oath would not invalidate the search warrants which were issued. Nor was the procedure used to obtain these warrants defective.

The New Hampshire Supreme Court approved the procedure followed in this case, in its opinion in the case of *State v. Titus,* 106 N.H. 219 (1965), in which the validity of a search warrant issued under similar circumstances was challenged.

The Court stated in its opinion, as follows:

"Under our practice, the evidence relied upon by an officer or magistrate to justify issuance of the search warrant is not required to be fully contained in the complaint upon which the warrant is issued. The allegation of the complaint may be supplemented by other evidence presented with it. State v. Coolidge, 106 N.H. 186. The issue of probable cause in such

a case, may be determined on the basis of all the evidence presented to the magistrate. . . . As was said in United States v. Ventresca, supra: '. . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a realistic fashion. A grudging . . . attitude . . . towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.' "

In two federal cases, the procedure followed in this case was also approved by the Courts.

In the case of *Lopez v. United States*, 370 F. 2d 8, the defendant challenged the validity of the search warrant which resulted in the seizure of incriminating evidence against him. The defendant was charged with narcotics violations. The affidavit, on the basis of which the magistrate found probable cause and issued the search warrant, did not have sufficient facts set forth in it to justify the issuance of the search warrant. However, the police officer who applied for the search warrant made oral statements to the magistrate with more information than the affidavits contained. These oral statements were made before the complaining officer swore to the affidavit. The Court held this procedure to be proper and valid and stated as follows:

"In reviewing the validity of a search warrant, this Court is limited to a consideration of the same information that was brought to the magistrate's attention. While it is doubtful that the affidavit, based largely upon hearsay, *alone* could have supported a finding of probable cause, we are of the opinion, and so hold, that the information obtained through 'further investigation', and brought to the magistrate in the form of oral statements made by the complaining officer, *together with* that contained in his affidavit, satisfies the legal requirements. . . . Appellant's contention that probable cause was not established, because the statements of Officer Barba to the magistrate were not under oath, it without merit. *It is of no consequence that the oath was taken after the statements were made, rather than before.*"

In the case of *Miller v. Sigler*, 353 F. 2d 424, the defendant was also convicted of a narcotics violation on the basis of evidence seized pursuant to a search warrant. The affidavit upon the basis of which the search warrant was issued was insufficient. Again, however, the complaining officer orally informed the magistrate who issued the search warrant of additional facts which, to-

gether with the affidavit, established probable cause. The Court upheld the validity of the search warrant.

The Court stated:

"Petitioner's main claim is that the affidavit and the statement of Officer McAdams to the magistrate is not enough evidence to support a finding of probable cause to issue the search warrant. The District Court held that the affidavit in support of the application was insufficient on its face to support the warrant. There is no doubt that this holding is correct. Aguilar v. State of Texas, supra, condemned the issuance of a warrant on the basis of an affidavit more complete than the one herein. This mere recital by Officer McAdams that he had received information that narcotics were being possessed or sold on the described premises is surely not sufficient evidence to allow the magistrate to make the required independent determination of probable cause. Before a search warrant may issue two steps must be taken. The application must be supported by 'Oath or affirmation, . . . describing the place to be searched, and the persons or things to be seized.' Next, the Fourth Amendment requires a showing of 'probable cause.' Even though the affidavit of the officer is not constitutionally sufficient, in itself, to support a finding of probable cause, it nonetheless fills the requirements of a proper 'Oath or affirmation' describing the place to be searched and the thing to be seized. In addition, it can be considered some evidence to support a finding of the necessary probable cause. Aguilar v. State of Texas, supra, however, demands something more than this bare affidavit. The 'something more' was supplied by Officer McAdams in his statement to the magistrate that he personally observed the odor of marijuana outside of the described premises. We feel as did the trial court, that this information before the magistrate justified the issuance of the search warrant. When this information is coupled with the affidavit indicating that the officer has additional outside information, presumable from an informer, there can be no doubt but that sufficient probable cause exists to issue the warrant."

Petitioner's brief states that the case of *Mancusi v. Deforte*, supra, governs the instant case. In that case a district attorney issued a subpoena which was used to seize certain records. This Court ruled that even if the subpoena were treated as a search

warrant it was invalid because the district attorney was not a neutral and detached magistrate.

The *Mancusi* case is distinguishable on its facts from the present case. The district attorney, in that case had no judicial authorization to act. The Attorney General in this case acted in his judicial capacity as a Justice of the Peace. The ruling of the Trial Court, upheld by the New Hampshire Supreme Court, that any Justice of the Peace, upon having presented to him the facts which were presented to the Attorney General, would have found probable cause for the issuance of the warrants, substantiates the fact that the Attorney General did act as a "neutral and detached magistrate" in issuing the warrants. It is manifestly clear that the Attorney General did not merely rubber stamp the actions of the police, but did, in fact, make an objective judicial determination as to the existence of probable cause on the basis of the facts presented to him. Under these circumstances, the holding of the *Mancusi v. DeForte,* supra, does not apply.

It is submitted, therefore, that the issuance of the search warrants by the Attorney General in this case was proper and valid when all the pertinent facts and circumstances have been considered and reviewed in the light of the constitutional and legal principles which apply.

III

THE SEIZURE OF PETITIONER'S AUTOMOBILE WAS INCIDENT TO A LAWFUL ARREST

The petitioner was arrested at his home on February 19, 1964, at 7:40 p.m. His two automobiles were parked outside of his home at the time of his arrest. They were impounded about an hour to an hour and a half after the petitioner's arrest, after a wrecker got there to tow them to the police garage. (App. 77-78).

Initially, it should be noted that petitioner, at no stage of these proceedings, has ever challenged the validity of the arrest warrant issued against him on February 19, 1964, and executed

on that date. (Exhibit E, App. 165-170). It must be presumed, therefore, that the arrest warrant was validly issued. *Anderson v. State*, 192 Wis. 352, 212 N.W. 628; *People v. Hall*, 8 Cal Rptr. 760, 186 C. A. 2d 388.

Under the prior decisions of this Court, the petitioner is foreclosed from raising the issue of the validity of the arrest warrant on this appeal since he failed to raise it at any time during the prior proceedings. *United States v. Atkinson*, 297 U.S. 157; *McGrath v. Manufacturer's Trust Co.*, 338 U.S. 241; *Walters v. City of St. Louis, Mo.*, 347 U.S. 231.

Under such circumstances, there is no issue as to the validity of the arrest warrant and the arrest of the petitioner on February 19, 1964, and it must be presumed, therefore, that his arrest was lawful.

In any event, the facts which were presented to the Attorney General in his capacity as a Justice of the Peace, as set forth in the Statement of this brief, were more than adequate to form a foundation for persuading him to find probable cause for the issuance of an arrest warrant to arrest the petitioner for the murder of the victim, Pamela Mason. The Trial Court so ruled. (App. 251). As noted, the Trial Court's ruling on this point was not raised during the appeal before the New Hampshire Supreme Court after petitioner's trial.

If the arrest of petitioner was lawful, then the seizure of the petitioner's 1951 Pontiac as an instrumentality of the crime, incident to the arrest, was also lawful. *Lefkowitz v. United States*, 285 U.S. 452; *United States v. Rabinowitz*, 339 U.S. 56.

The respondent does not claim that the searches of petitioner's 1951 Pontiac on February 21, 1964, and on the subsequent dates were incident to a lawful arrest as suggested in petitioner's brief. The respondent does contend, however, that the seizure of the petitioner's 1951 Pontiac was incident to a lawful arrest and that police custody of it thereafter was lawful.

The validity of the searches of petitioner's 1951 Pontiac after it came into police custody will be discussed later in this brief.

IV

THE SEIZURE OF PETITIONER'S AUTOMOBILE WAS VALID ON BASIS OF PROBABLE CAUSE ALONE

When the police arrested the petitioner at his home on the evening of February 19, 1964, his 1951 Pontiac automobile was parked in the driveway outside his home in plain view. The automobile was in a mobile condition.

At the time of petitioner's arrest, the police officer had sufficient evidence and knowledge of facts to establish probable cause that the petitioner had murdered the victim, Pamela Mason, and that petitioner's 1951 Pontiac automobile was an instrumentality of the crime.

Under such factual circumstances, the police had not only a right, but also a duty to seize the petitioner's 1951 Pontiac automobile, just as much as they would if it were the murder weapon itself lying in the driveway instead of an automobile which was an instrumentality of the crime.

Under such circumstances, the probable cause alone was sufficient to justify the police seizure of petitioner's 1951 Pontiac automobile. *Chambers v. Maroney,* 399 U.S. 42; *Carroll v. United States,* 267 U.S. 132; *Harris v. United States* 390 U.S. 234.

The validity or invalidity of the arrest warrant under such circumstances is immaterial.

The police conduct on this point, without regard to the validity or invalidity of either the search warrant or the arrest warrant, was proper. It was their duty to seize the petitioner's automobile under such circumstances, and having done so, it would be illogical and unrealistic to hold that this police conduct deprived the petitioner of any constitutional rights under the Fourth and Fourteenth Amendments.

V

VACUUM SWEEPINGS OF PETITIONER'S AUTOMOBILE LEGALLY WERE NOT SEARCHES AND SEIZURES

After the police impounded petitioner's 1951 Pontiac automobile on February 19, 1964, and had, as respondent contends, lawful custody of such automobile, vacuum sweepings were made of the interior of the automobile on February 21, 1964, February 24, 1964, January 4, 1965 and April 10, 1965. (App. 269).

Respondent contends that, legally, such vacuum sweepings, did not amount to searches and seizures. It is contended that, in effect, all that the police did by means of the vacuum sweepings, was to pick up, by means of the vacuum cleaner, items which were in plain view in the automobile, namely the minute particles and other debris lying on the floor and on the upholstery in the automobile. *Weeks v. United States,* 232 U.S. 383; *Ker v. California,* 374 U.S. 23; *Harris v. United States,* 390 U.S. 234.

Upon analysis, the police in this case did nothing different from what the police did in the case of *Harris v. United States,* supra. This Court, stated in that case, as it has repeatedly held before:

> ". . . objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

In *Harris v. United States,* supra, which involved a robbery, the defendant's car was seen leaving the scene of a robbery. The defendant was arrested several hours later as he was getting into the car in front of his home. The defendant was arrested at 1:30 p.m. and the car was not towed to the police station lot until 3 p.m. The towing driver told the arresting officer that although it was raining and the windows of the car were down, he had not rolled them up because he did not want to disturb any fingerprints. The arresting officer immediately went out to inventory the contents in the interior of the car, as required by his police department regulations, and also to roll up the windows of the car because it was raining. After completing the in-

ventory, and as he was rolling up a window on the passenger side of the car, he found a card which had been lost from the wallet of the robbery victim.

One of the questions raised upon appeal after the defendant's conviction for robbery was whether or not the officer had made a search of the defendant's car in doing what he did. This Court ruled that no search took place since the card which was seized was in open view.

VI

LAWFUL CUSTODY OF PETITIONER'S AUTOMOBILE JUSTIFIES SEARCHES AND SEIZURES OF PARTICLES IN AUTOMOBILE WITHOUT WARRANT

Even if it could be held that the vacuum sweepings of petitioner's 1951 Pontiac automobile were in fact searches and seizures, such searches and seizures were lawful and valid since the police had lawful custody of the automobile at the time. *Cooper v. California,* 386 U.S. 58.

In *Cooper v. California,* supra, the defendant was arrested on a narcotics offense and his car was impounded in the police garage and held for forfeiture proceedings. A week after the defendant's arrest, the impounded car was searched and in the glove compartment evidence was found which was later introduced at the trial of the defendant on the charge of selling heroin.

This Court found the search reasonable, and held that no error was committed in its introduction in evidence although it had been found in a search that was remote both in time and place from the arrest. It was stated in that case, distinguishing the case of *Preston v. United States,* 376 U.S. 364, as follows:

"The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car. This case is neither Preston nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. *They seized it because of the crime for which they*

arrested the petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. *Their subsequent search of the car — whether the state had "legal title" to it or not — was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it had been retained. . . ."*

The following cases involve the principle stated in *Cooper v. California,* supra, *that lawful custody of a vehicle justifies its search without a warrant at any time, if the search is closely related to the reason for defendant's arrest and to the reason the vehicle was impounded and retained.*

In the case of *United States v. Sconfienza,* 309 F. Supp. 322, (1970), the defendant and two others were observed by a police officer using binoculars stealing two white cartons and a sack out of a railway office and placing them in the trunk and one of the cartons in the rear of a black Buick car. The defendant then alone drove the car away from the railway office. The police officer who observed this notified a patrol car in the area through radio of what he observed, and the patrol car stopped the defendant just off the railroad property and arrested him.

As the police were arresting him, one of them observed a portion of one white carton in the back seat of the car partially covered by a blanket, but in plain view.

The police officers, without searching the car or seizing any items from it, took the defendant in the patrol car to the police station where his pockets were emptied. One officer took the defendant's car keys, which had been in his pocket, and returned to the defendant's car.

The officer drove the car back to the police station, where it was then searched by the police, both the back seat area and the trunk, and without a search warrant. Two white cartons and the bag, which were stolen goods, were found therein. The time between the arrest and the search was about 10 minutes at most.

The defendant moved to suppress this evidence on the ground that, although there was probable cause for his arrest and thus a search without a warrant could be justified as incident to his arrest, the search, coming when it did, was not in fact incident to his arrest, relying on *Preston v. United States,* 376 U.S. 364.

The Court, relying on *Cooper v. California,* supra, denied his

motion to suppress this evidence, and after distinguishing *Preston v. United States,* supra, held:

> "With ample ground to believe that the car was an instrumentality used during the robbery, there was a sufficient connection to justify a reasonable search a few minutes later at the stationhouse only three blocks from the place of arrest. Even if this was not the case, *the inspection of the car could be considered as an examination by the police of a vehicle lawfully seized.*"

In the case of *United States v. Doyle,* 373 F. 2d 875 (1967), the defendant entered a bank, held up the employees and made off with $4200 of the funds of the bank, driving away in a black Falcon. As a result of diligent police work, defendant was arrested at his home within 10 minutes of the robbery. At the time of his arrest, the black Falcon was parked in the driveway. The police, after arresting the defendant, searched the car and found among other items of incriminating evidence connecting defendant with the robbery, a paper bag containing $4200 in United States currency. Defendant was convicted of armed robbery.

On appeal, the defendant contended that the search of his automobile without a warrant was illegal since it took place after he was under arrest and in custody of the police. The Court upheld his conviction and held:

> "The search of the black Falcon was substantially contemporaneous with the arrest. The car was in Doyle's immediate presence and but a few feet from him when he was handcuffed and taken into custody. *Indeed the car was itself an instrumentality of the crime.* Judge Mishler's finding that there was "abundant proof of probable cause" and that the search was reasonable is overwhelmingly supported by the evidence in the record before us. The fact that a search warrant might have been obtained is not a controlling factor. Ker v. State of California, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). Under the circumstances of this case it was more important to make the search at once in order to pursue effectively and promptly the necessary investigation into the details of the robbery, the existence of collaborators or accomplices and the identity of witnesses. It was also proper to attempt to find at the earliest possible moment the pistol used in the hold-up."

In the case of *Harris v. Stephens,* 361 F. 2d 888 (1966), cert. denied, 386 U.S. 964, the two defendants were charged with rape and convicted. In this case, the victim had been picked up by the two defendants in an automobile and driven to the place where she was raped by them. On the day after the crime, the victim was taken by the sheriff to the home of the defendant Trotter, where the automobile was identified by the victim's escort. The automobile was still warm and stains were noticed on the upholstery. The defendant, Trotter, came to the door wearing bloodstained shorts. The sheriff arrested Trotter and had him drive his automobile to the jail.

The sheriff then went to defendant Harris' home and questioned him. Upon receiving an unsatisfactory explanation from Harris as to his whereabouts, the sheriff asked to see the clothes Harris had worn. Harris' clothes were stained with blood and the victim's wrist watch was found in his billfold. The sheriff then arrested defendant Harris.

On appeal the defendants contended that the officers had no probable cause for arrest and consequently the search and seizure of certain articles were illegal. The Court upheld the convictions, ruled that there was probable cause for the arrest of the defendants and stated:

> "*Since the arrests were lawful, the search and seizure incident thereto were likewise proper.* The articles were discovered and seized contemporaneously with the arrests. It was also proper for the arresting officers to thoroughly search Trotter's automobile after apprehending Harris. They had previously noticed stains on the upholstery and had Trotter drive the car to the jail. *The car was an instrument used in the commission of the crime.* Shortly after Harris was arrested and brought to jail, the search of Trotter's car was continued. By daylight the stained upholstery was much more obvious. The search of the automobile was also incident to the arrest."

In *Johnston v. State,* 238 Md. 528, 209 A. 2d 765, another rape case involving the use of an automobile, on the day of the arrest, the victim's coat and purse were removed from the trunk of the automobile after it was towed to the police station and after the defendants were under arrest. Three days later sweepings and dust samples were taken from the automobile by another officer. All of these articles were admitted as evidence at defendants' trial over their objections.

On appeal, their contention that these articles were obtained by an unlawful search and seizure was rejected, and their convictions were upheld. The Court stated:

"Where there has been a valid arrest, property found in connection with the arrest which tends to establish the commission of the crime charged may be held by the officers for evidence. If the arrest is lawful, the seizure is lawful, if the property is of an evidentiary nature.

. . .The automobile itself could have been offered in evidence at the trial. Having lawfully seized it, the police had the right to examine it after the seizure for evidence in connection with the crime. In any event, the sweepings and dust samples were introduced to show that Mrs. Haymaker was in the car and to place the car at the scene of the alleged rape. The appellant Johnson testified that Mrs. Haymaker was in the car and his statement was not contradicted; there was voluminous other evidence that the car was at the place described."

In the case of *State v. McCoy,* 249 Or. 160, 437 P. 2d 734 (1968), the defendant was convicted of the crime of rape. The defendant lured the victim into his automobile, drove her out into the country and raped her in the automobile. The police arrested defendant at his place of business upon an arrest warrant. At the time of his arrest, his automobile was parked in the street about ten feet from his shop. The defendant was driven to the police station in the police car and his car was towed to the police station and searched there without a warrant. In the car the police found human hair like that of the victim, and a rag with semen on it which the victim said the defendant used to wipe himself with after he raped her.

The Trial Court denied defendant's motion to suppress this evidence, contending that search of his automobile and seizure of the evidence were without a warrant and in violation of his constitutional rights. On appeal, the Court upheld the denial of defendant's motion to suppress. The Court, stated in part as follows, relying on *Cooper v. California,* supra,

"*Here the officers took custody of the automobile as an instrumentality of the crime,* as evidence (photographs of it were introduced in evidence without objection on the trial) and to search it for incriminating evidence of the crime for which the defendant was arrested, and which the officers had

reasonable cause to believe the automobile might contain. There can be no question about the officers' good faith, no room for a contention that there "conduct was inconsistent with their declared purpose"; Harris v. United States, supra, 331 U.S. at 153, 67 S. Ct. at 1103. Assuming they had time to secure a search warrant, they were not bound to do so, "because the search was otherwise reasonable": United States v. Rabinowitz, supra, 339 U.S. at 64, 70 S. Ct. at 434.

In view of the nature of the crime charged, to vacuum the car was reasonably considered an essential part of the search — not to have done so might, indeed, have been dereliction of police duty. A vacuum cleaner, it is true, might have been brought to the scene of the seizure for that purpose, but we think this was not required. To tow the car away from a city street was a proper precaution to "insure against any third party's tampering with the evidence," . . . and afforded the officers "better conditions for the search."

. . . The automobile, as we have said, was not only evidence, but, as well, an instrumentality of the crime. . .

As such the automobile was subject to seizure and, being in plain sight, no search for it was required."

In *People v. Webb*, 66 Cal. 2d 107, 424 P 2d 342, involved was a search made after the automobile was in police custody without a warrant. The Court upheld the search and stated:

"A search is now permissible without a warrant if the vehicle is in valid police custody. The search was, therefore, proper under Cooper, supra."

VII

THERE WAS NO SEARCH AND SEIZURE OF PETITIONER'S PERSONAL POSSESSIONS ON FEBRUARY 2, 1964

The second argument in petitioner's brief assumes that the events which took place at his home on February 2, 1964, when two police officers obtained his rifles and clothes, amounted to an unlawful search and seizure. The petitioner's argument then

revolves around the question of whether or not a wife can acquiesce in the search and seizure of her husband's personal effects in a criminal investigation in keeping with the requirements of the Fourth Amendment.

The second issue does not need to be reached until the first one is decided. If there was no search and seizure in the first instance, then there is no constitutional issue to be decided and the Fourth Amendment does not apply.

A fair reading of the evidence relating to events which took place on February 2, 1964, clearly points to only one conclusion: the petitioner's guns and clothes were not obtained as the result of an unreasonable search and seizure. In fact, all the facts indicate that there was no search, legally or practically, and also that there was no seizure in the legal context of the Fourth Amendment.

The evidence substantiates the following salient facts:

1. On February 2, 1964, the petitioner was certainly not a prime suspect in connection with the crime which the police were investigating and perhaps, not even a suspect at all.
2. At the time the police were conducting a very general investigation of the Mason murder, and were questioning many people. From time to time the police had taken various weapons, with the consent of the people, to be examined. (App. 202-204).
3. On the evening of February 2, 1964, the petitioner saw his firearms at the Manchester Police Station after they had been brought to the station by two police officers.
4. On the next morning, February 3, 1964, the petitioner offered to sell one of his firearms to Inspector Glennon.
5. Although the petitioner was free on bail, from February 3, 1964 to February 19, 1964, and was represented by counsel during that period of time, he neither requested nor demanded the return of his firearms and clothes from the police.
6. The entire evidence relating to the events of February 2, 1964, taken in context, points to one inescapable conclusion: there was no search of petitioner's premises and

no constitutionally prohibited seizure of his firearms and clothes.

7. There is not even the slightest inference of fraud, intimidation, coercion or any other unlawful action by the police officers on that date.

The facts, as fully set forth in the statement of this brief, clearly indicate that the petitioner's clothes and guns were freely and voluntarily given to the police by the petitioner's wife. The New Hampshire Supreme Court so ruled in 106 N.H. 186, (App. 207-225) as follows:

"On the facts and circumstances of this case it is our opinion that the four guns and certain objects of defendant's clothing obtained from his residence on the night of February 2, 1964, by officers McBain and Glennon were not secured by search and seizure. On the contrary they were voluntarily shown and given to them by Mrs. Coolidge without coercion on their part and were taken away by the officers with her consent. . ."

The evidence adduced at the hearing upon Coolidge's Petition to Quash fully justifies this ruling. The evidence establishes quite clearly that:

1. There was no search of the petitioner's home on February 2, 1964 by Inspector Donald Glennon and Det. Sgt. William McBain.

2. The items of personal property obtained from the petitioner's home on February 2, 1964, were voluntarily given to Inspector Glennon and Det. Sgt. McBain by Mrs. Joanne Coolidge, the wife of the petitioner, with a statement by Mrs. Coolidge to the effect: "We have nothing to hide."

There is no conflict in the testimony on these two points. The police officers testified to the above two points and their testimony was corroborated and substantiated by Mrs. Joanne Coolidge, the wife of the petitioner. In fact, Mrs. Coolidge even amplified the testimony of the police officers in some respect on a few minor points. An example of this is her testimony that when she asked the officers if they wished to take the firearms, one replied: "No", and the other answered: "We'd better take them."

Also, it is interesting to note that in turning these items of personal property over to the police officers that night, Mrs. Coolidge was doing nothing more than her husband had already done on the previous Tuesday, January 28, 1964, when Officer Maurice Leclerc and Det. Sgt. Paul Doyon talked with him at their home and in her presence. At that time, Officer Leclerc and Det. Sgt. Doyon both testified that Coolidge was very cooperative, answered all of their questions, showed them his firearms, agreed to take a lie detector test, and gave them permission and assisted them in searching his two automobiles. Certainly this conduct on her husband's part on Tuesday, January 28, 1964, gave her every reason for believing they had nothing to hide and for answering the question of Inspector Glennon and Det. Sgt. McBain and for her offering to them and turning over to them certain items of personal property in the house, as well as allowing them to search their two automobiles.

Another important point to note is that Inspector Glennon and Det. Sgt. McBain did not go to the petitioner's home on that Sunday evening for the purpose of obtaining any items of personal property. From their testimony it is clear that they were there for another purpose and not for the purpose of obtaining any property of any kind. They testified that they went to see Mrs. Coolidge that night primarily to talk to her about the Mason case in relation to her husband's activities on the night of January 13, 1964. It was only after conversation with her *and after she offered to turn over certain items of personal property* to them that they did take certain items of personal property from her.

It is particularly obvious from the testimony of Inspector Glennon and Det. Sgt. McBain that they were not at the Coolidge home that evening for the purpose of searching for or taking any firearms, since they testified that at that point in the investigation they were not looking for any particular type of firearm but were checking firearms generally, that they thought they were looking for a small hand gun, and that they did not even know Coolidge owned any firearms before they went there that night. Their obtaining the petitioner's firearms that evening was only an incidental result of their going there for an entirely different purpose and a direct result of an offer by Coolidge's wife to turn these firearms over to them.

The term "search" has a particular meaning in this context of "search and seizure". It is defined in Volume 79 of *Corpus Juris Secundum,* under the topic "Searches and Seizures", at pages 775 and 776, as follows:

> "The term 'search' as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. As used in this connection the term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search'."

A search in the constitutional sense "ordinarily implies a quest by an officer of the law" for some object. *Weeks v. United States,* 232 U.S. 383.

In the case of *Hale v. Henkel,* 201 U.S. 43, this Court defines a "search" as follows:

> "A 'search' ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible dispossession of the owner."

This definition of the term "search" as set forth in Corpus Juris Secundum and as defined by this Court in the Hale case has been followed and adopted by many state court decisions, and by the decisions of the lower federal appeal courts. See: *State v. Morris,* S.C., 133 SE 2d, 744, 748: and *U.S. v. Cook,* D.C. Tenn. 213 F. Supp. 568, 571.

The case of *U.S. ex rel Stacey v. Pate,* 324 F. 2d 934, 935 is particularly pertinent since it is somewhat analogous to the facts as presented in this case. Petitioner therein was convicted of murder and sentenced and after exhausting state remedies, filed a petition for writ of habeas corpus which was dismissed and this

appeal followed. The facts were briefly that a woman was found stabbed to death in her apartment in Chicago and the police arrested petitioner that same evening without a warrant. Early the following morning at the police station, petitioner was requested to remove his shirt and the officer noted a spot on his T-shirt which appeared to be blood. The officer said he was going to petitioner's house to see about the shirt he had been wearing the previous day and the petitioner said: "Go ahead." Two officers then appeared at petitioner's house and questioned his wife about the shirt he had worn the previous day and asked her to produce it. She then gave them the blood-stained shirt. Petitioner confessed to the murder when confronted with the shirt. In affirming the lower court's decision the court held at page 935:

> "Upon a review of all the evidence we think petitioner's contention that the blood-stained shirt was obtained by an unlawful search of his house has no merit. Police officers went to the premises where incriminating evidence was found and were voluntarily given the shirt. Their action did not constitute a search. It is of no consequence that the person who gave the police the blood-stained shirt was petitioner's wife. . . . Petitioner's privacy was not invaded. There was no inspection or examination of his household. Under these circumstances, we hold there was no search either in an actual or legal sense."

The facts in testimony, when viewed in the light of the above definitions, indicate that no "search" of the petitioner's premises was made by Inspector Glennon and Det. Sgt. McBain on Sunday evening, February 2, 1964. There was no examination at all of his home by them that evening. There was no exploratory investigation on their part, no invasion and quest, and no looking for and no seeking out. There was no implication of force, either actual or constructive, on their part. In short, there was no "search" but only a voluntary offer by Mrs. Coolidge to turn over certain items of personal property, which they accepted.

A fair reading of the evidence indicates that the only thing that happened at the petitioner's home on Sunday evening, February 2, 1964, when petitioner was in the police station, is that his wife *voluntarily* turned over to the policemen who called upon her the petitioner's guns and some of his clothes.

From the testimony, it is evident and obvious that the police were not there to pick up anything belonging to the petitioner.

The fact that they did obtain petitioner's guns and clothes was an incidental by-product of their visit there to discuss petitioner's activities on the night of January 13, 1964 with petitioner's wife. It was only after her offer to turn over the guns had been rejected by one officer, that the other officer accepted and offered to take them.

It should be remembered that in the eyes of the police at this time petitioner was not even a prime suspect at all. The police were conducting a very general investigation at this time into the murder of the victim, Pamela Mason. What took place at the petitioner's home that evening was only a small part of the overall police investigation going on at the time. Many people were being questioned by the police at this time. Many other weapons had been turned over to the police for testing.

The only fact the police had in their possession about the petitioner at this time was that he was not at home on the evening of the murder from 5:30 p.m. to 11:15 p.m. This alone was hardly enough to make the petitioner a prime suspect in the case or even a suspect at all for that matter.

Since petitioner had agreed to take a lie detector test, he came voluntarily to the police station that Sunday and took the test. After taking the test, the police naturally asked him about his whereabouts on the night the victim was murdered. Technically, petitioner was not in police custody that Sunday nor was he being detained against his wishes.

Since petitioner kept giving different versions that day to the police about his whereabouts on the night of the victim's disappearance, the police very naturally pursued this matter with him until they had completed it. This was normal police work and was not unusual at all.

During the course of the lie detector test petitioner admitted a larceny he had committed. This was a voluntary admission on his part, and obviously the police were not going to overlook this. Outside of this, however, the petitioner was free to go if he wished.

At no time that Sunday did petitioner protest and ask to leave the police station. The police did not mistreat the petitioner in any way. They did not coerce him, trick him or abuse him in any way whatsoever, mentally or physically. He was fed and

he was not uncomfortable in any way. Petitioner could have stopped talking to the police at any time. The fact that he did not indicates to some extent that he must have felt that there was some advantage for him to keep talking.

After petitioner admitted the larceny, the police did not discuss this with him further until they arrested him at 2 a.m. the next morning.

In short, all the events which took place on Sunday, February 2, 1964, both at the police station and at petitioner's home, were nothing more or nothing less than routine police work being carried out in an attempt to solve a very heinous crime, the brutal murder of a 14 year-old girl.

It is within this factual framework that the petitioner is challenging what happened as being a violation of his constitutional rights under the Fourth and Fourteenth Amendments.

Petitioner's brief undertakes a long and elaborate analysis of cases involving the conduct of a wife turning over to police personal effects of her husband in a criminal investigation.

Underlying the analysis in petitioner's brief of these cases is the basic assumption that the activities of the police on Sunday, February 2, 1964 amounted to a *"search and seizure"* of the petitioner's personal effects, both factually and legally.

The basis for this assumption is a further assumption not warranted in the least by a fair reading of the evidence: that although the presence of the police in petitioner's living room or kitchen was not unlawful, however, *"an unlawful search and seizure surely began when the officers demanded any guns belonging to the petitioner."* (Petitioner's Brief, p. 20)

The petitioner is apparently unwilling to accept the facts as they occurred. The police made no demands whatsoever on this visit. The assumption made by petitioner's brief that the evidence indicates a *demand* by police for petitioner's guns, is an obvious misconception of the uncontradicted testimony on this point. The misconception in petitioner's brief somehow serves to transform the activities of the police at petitioner's home on the evening of February 2, 1964 into an *unlawful search and seizure.*

This transformation then further serves as a foundation upon which petitioner's brief builds an imposing and ornate legal edifice which explores the legal proposition of the right of a wife

to cast away a husband's constitutional rights under the Fourth Amendment. The petitioner's brief then extensively explores the highways and byways of the legal proposition of whether proof of a wife's acquiescence *in the search and seizure of her husband's personal effects in a criminal investigation* in which he but not she is involved is enough to satisfy the Fourth Amendment.

The imposing and rambling legal edifice constructed by petitioner's brief on this point shrinks into an ineffectual exercise in legal semantics if the fundamental premise *of an unlawful search and seizure* is unwarranted by the facts. The respondent submits that this is so.

Without belaboring the facts concerning the events of February 2, 1964, one inescapable conclusion emerges: In showing the police the petitioner's guns and clothes, his wife was only doing what he had previously done on the evening of January 28, 1964 when two other police officers questioned him at his home. On that occasion, he also voluntarily showed the police his guns, was cooperative, answered all of their questions and even assisted them in searching his vehicles parked outside of his home. The effect of this activity by petitioner on his wife was obvious. It can be summed up by stating that his actions indicated to his wife that he had nothing to hide.

Under such circumstances, it can be reasonably argued that petitioner, by his actions on January 28, 1964, gave *tacit consent* to his wife to do what she did on the evening of February 2, 1964, in handing over petitioner's guns and clothes to the police. It is significant, in this analysis, to note that the petitioner's wife, in handing over the guns to the police that evening stated: *"We have nothing to hide."*

On the basis of what had previously occurred, petitioner's wife was acting reasonably in doing what she did.

Factually, there was no search here. There was no "quest" by police here and they did not pry or search petitioner's premises in any way on February 2, 1964. They accepted only what was given to them by petitioner's wife. Legally, this could not rise to the level of what is commonly understood as a "search" in this area of constitutional law.

Also, factually, although there was a *taking* here by the police of petitioner's personal effects, the real question is whether, *legally*, this resulted in a constitutionally prohibited seizure.

Respondent submits that both factually and legally, *there was no search for and there was no seizure of petitioner's personal effects* by the police on February 2, 1964.

The real issue at this point then, as respondent views the situation reduces itself to this: In a constitutional sense, do the events which occurred on February 2, 1964 amount to an unreasonable search and seizure of petitioner's personal effects in violation of his rights under the Fourth and Fourteenth Amendments. It is submitted that they do not.

Even if the facts indicated a search and seizure in this case, which they do not, then, it is submitted that, in such a case, this Court should uphold the validity of such a taking on the basis of the wife's voluntary consent.

This Court has never decided the question of the capacity of one spouse to authorize a consent search of the family dwelling that is valid against the other spouse. The issue was raised in two cases but not decided. *Amos v. United States*, 255 U.S. 313; *Henry v. Mississippi*, 379 U.S. 443.

In cases involving a consent situation, the general rule appears to be that a valid consent to search premises can be given only by a person who has an immediate and present right to possess these premises. If he consents, the search is valid as to any person against whom evidence is found. It is generally held that the constitutional right to be free from unreasonable searches and seizures protects the possessory right and not legal title. *Chapman v. United States*, 365 U.S. 10; *Stoner v. California*, 376 U.S. 483; *Frazier v. Cupp*, 394 U.S. 731.

In the husband and wife situation, and in related family situations, the lower Federal courts, have generally upheld such searches upon the same rationale, namely, the protection of the possessory right and not legal title. *Roberts v. United States*, 332 F. 2d 892; *Stein v. United States*, 166 F. 2d 851; *United States v. Sergio*, 21 F. Supp. 553; *United States v. Sferas*, 210 F 2d. 69; *United States v. Stone*, 401 F. 2d 32; *Maxwell v. Stevens*, 348 F. 2d 325.

In the case of *United States v. Alloway*, 397 F. 2d 110, the defendant was convicted of armed robbery of a Federal Savings and Loan Association. He appealed and the Court of Appeals held that the voluntary consent of a defendant's wife to the taking of two dark suits from the defendant's house trailer validated the seizure of the suits and their use as evidence at the trial where it was testified that the robber had worn a dark suit. The Court stated:

> "It has been held that voluntary consent by a wife or other relative may, under proper facts, support a search that turns up evidence of an accused's criminal conduct. . . . We hold that in the factual context of this case, the wife's consent made lawful the seizure of the suits and their use as evidence. The search was reasonable."

In the case of *United States v. Retolaza*, 398 F. 2d 235, the defendant was also charged with bank robbery. He was found guilty and appealed. The Court of Appeals held that there was no search within constitutional prohibition, where officers, with an arrest warrant were admitted to the defendant's apartment by his wife to confirm that he was not there. While there, the wife voluntarily produced and turned over the money taken in the robbery and a gun. The Court stated:

> "Undoubtedly Mrs. Retolaza was at a psychological disadvantage during this interview, especially when she had concealed beneath a sofa cushion a loaded shotgun where she was sitting, the existence of which she earlier denied. We cannot say, however, that her will was so overpowered that her production of the money and the gun were rendered involuntary acts on her part so as to constitute their production an illegal search and seizure. She was not under arrest or threatened with arrest. It was she who identified what incriminating articles were secreted on the premises and it was she who produced them. . . . We find no illegal search and seizure.

The recent case of *Frazier v. Cupp*, supra, decided by this Court, stands for the same principle. In this case admitted into evidence was some clothing which officers had seized from the petitioner's dufflebag which he and Rawls had used jointly and which the officers had found during the search conducted with Rawls' consent. The petitioner was convicted and the State Supreme Court affirmed. The petitioner thereafter filed a petition

for a writ of habeaus corpus in the district court which granted the writ. The Court of Appeals reversed.

The petitioner claimed that the prosecutor's use of the clothing amounted to an illegal search and seizure in violation of the Fourth and Fourteenth Amendment rights. The Court held the clothing from the petitioner's dufflebag was found in the course of a lawful search since Rawls, a joint user of the bag, had authority to consent to its search. The Court stated as follows:

> "Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's dufflebag to be introduced into evidence. The dufflebag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the dufflebag and both Rawls and his mother consented to its search. During this search the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it. . . . Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag, and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case."

Viewed in this light, the second argument in petitioner's brief is an exercise in metaphysical subleties and should be rejected.

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be upheld for the foregoing reasons.

Respectfully submitted,

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